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Supreme Court of the United States.

Office Supreme Court U. S.
FILED
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JAMES H. McKENNEY, Clerk.

HENRY MUHLKER,
Original Plaintiff,
and
Plaintiff in Error,

against

THE NEW YORK AND HARLEM RAILROAD COMPANY AND THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY,
Original Defendants,
and
Defendants in Error.

Reply to Defendants Supplemental Brief (Filed after the Argument).

No. 99.

I.

1. The defendants in error concede that the elevated railroad decisions are in full force and effect in the State of New York. That is to say, it is a general rule of property in the State of New York, that abutting owners have easements of access, light, and air in the streets, which constitute interests in real estate, and which cannot lawfully be taken for public use without compensation. (See plaintiff's original brief, Appendix, p. 74.)

2. The facts found in this case show that the plaintiff in error had these easements in the street known as Park or Fourth Avenue.

First finding of fact: "That the plaintiff has, and during the periods of his ownership, as aforesaid, had, as appurtenant to his said lot and building, certain easements of light, air, and access in and over said Park Avenue in front of said premises." (Record, pp. 22-3.)

Seventh finding of fact: "That the said permanent structure and the operation by said defendant * * are and have been a continuous trespass upon the plaintiff's easements of light and air appurtenant to his said premises." (Record, p. 25.)

Second clause of judgment: "That in case the said defendants shall, at least five days before the said injunction shall become operative, tender * * * a form of conveyance and release to said defendants of the plaintiff's easements of light, air and access appurtenant to said premises, taken by the maintenance and use of defendants' said permanent elevated railroad structure, as the same is now maintained and used; * * * then the said injunction shall not in any manner become operative." (Record, p. 29.)

3. The Court of Appeals, far from reversing or questioning the possession of these easements by this plaintiff, based their reasoning upon the express assumption of the facts thus found. They say: "Undoubtedly the state had also the power to provide in the act for compensation to abutting owners, and to apportion the expense incurred in the acquisition of *the easements destroyed* upon the defendant and the city of New York * * * But that it possessed the power to improve the street, as it did, for the benefit of the public, in the manner that it did, compelling abutting owners to bear so much of the burden of the improvement as resulted from the *partial destruction of their easements of air, light and access*, we have no doubt." (Record, p. 170.)

4. The consideration of this case must, therefore, rest upon the firm foundation of established fact, that the plaintiff in error had, under the settled law of New York, an interest in the strip of land known as Park or Fourth Avenue, which under a statute of the state has been taken from him without compensation, and which could not be lawfully taken without compensation, unless

some good reason is shown to take his case out of the general rule and make lawful what would ordinarily be a violation of constitutional right.

II.

1. The justification for this action, given by the defendants in their supplemental brief, is, that the defendant railroad companies had acquired certain rights in Fourth Avenue. They concede, in effect, that, except as the railroad companies had prior to the state statute of 1892 acquired specific property rights in Fourth Avenue which justified them in operating an elevated railroad before the plaintiff's premises, there is no justification.

2. What rights had the defendant railroad companies acquired?

(a) There is no pretense that they had acquired *title* to this strip of land. The land on which the railroad runs, was conveyed to the city before the defendant companies came into existence, in trust, to be held for street uses; and there is no pretense that the city has ever parted with the title.

(b) The railroad company entered upon the land and laid down its road under the express consent of the trustee, embodied in a formal agreement, by which its occupation was made subordinate to the uses of the street, and by which that occupation was to cease and the railroad was to be removed if the city found that when the street was graded, the railroad interfered with the use of the street. (Record, p. 117.)

(c) As between the city, which owns the street as trustee, and the railroad company, the railroad is there upon sufferance.

(d) In the condemnation proceedings of 1850-3 the strip of land occupied by the railroad was included, and any possible question set at rest by its condemnation for street purposes, on nominal compensation to the railroad company.

8. The rights of the railroad company in Park Avenue are, therefore, nothing but an easement enjoyed by consent of our trustee, the city, originally deemed to be consistent with the trust upon which the street was held, subject to agreement for removal, if it should ever be found inconsistent with that trust.

4 The court below held that the railroad company had enjoyed this particular easement so long without objection by the abutting owner, that the abutting owner had lost the right to object, and that as against him the railroad was entitled to continue to run as it had been running, on and below the surface of the street. That is the whole of the railroad company's right in the street.

5. The defendants' contention, therefore, is, in effect, that our failure to prevent a use of the street permitted by our trustee, and which did not take away our easements of light and air, gave the railroad company a right to make an entirely different use of the street, which does take away those easements of light and air. This is contrary to established and familiar law. "The right acquired by prescription is commensurate with the right enjoyed. The extent of the enjoyment measures the extent of the right. The right is supposed to have had its origin in a grant, and the grant being lost, the user is the only evidence of the right granted, and as the presumption of a grant only exists where there has been an adverse, continuous and uninterrupted user, according to the nature of the easement claimed, for the period of twenty years, the prescriptive right is confined to the right as exercised for that period of time."

Prentice *v.* Geiger, 74 N. Y. 341, 347.

6. No justification for the elevated railroad structure is, therefore, to be found in any rights acquired by the railroad company itself.

III.

The Court of Appeals has taken no such position as that taken by the defendants and considered above. That court based its attempt to justify the destruction of our easements not upon any rights which the railroad company had acquired, but upon a *public right* to improve the street for the general use of the public by securing the removal of the railroad tracks from the surface of the street and from the cut in the center of the street, through which the railroad ran at some points; and they say that as the removal of the railroad from the surface and the cut is a benefit to the general public, they are justified in authorizing the railroad, in lieu of its former occupancy of the surface, to occupy an elevated road in front of our premises which destroys our easements. They say, in many different forms of expression, that the public benefit which would be secured by getting the railroad off the street, justifies putting this structure above the street and giving the exclusive use of it to the railroad company in lieu of the railroad company's former occupancy of the surface. (Record, pp. 163 *et seq.*)

IV.

We thus come back to what is the real and vital question in the case. Could the state, in order to secure the consent of the railroad company to the removal of its tracks from the surface of the street, compensate it by giving it authority to operate its elevated structure in front of our premises without compensation for the easements which it destroyed?

We submit that it could not. It is not disputed that we owned the easements described in the findings and in the opinion of the Court of Appeals; that the executed contracts, which created

the trust upon which the street was held, protected us against any structure in the street inconsistent with street uses, except as the railroad company may have acquired rights on the surface and below the surface; that no structure which is inconsistent with such street, can be authorized by the state without impairing the obligation of those contracts; that the elevated structure, the exclusive use of which is conferred upon these railroad companies by the state, is inconsistent with street uses, and destroys the easements protected by those contracts. We submit that the constitution must prevail, and that this inconsistent use without compensation must be condemned, whatever were the motives which led to the attempt to authorize it.

An analysis of the transaction discloses two separate acts by the state.

(1) The first was the removal of the railroad from the surface and the cut. This the state had the undoubted authority to accomplish, either through the reserved rights of the city in the contract under which the railroad company laid down its tracks, or upon making compensation to the railroad company. If this were accomplished upon making compensation, the burden would have fallen upon the general body of the tax-payers, or would have been spread by assessment upon all the property owners benefited by the removal.

(2) The other act done by the state was the grant to the railroad company, by way of compensation, of authority to maintain, operate, and exclusively enjoy its elevated railroad structure inconsistent with the uses of the street. That compensation is made at our expense by depriving us of the obligation of the contracts to which we are entitled, and by the destruction of our property rights. The state cannot lawfully purchase a benefit by thus authorizing the destruction of our rights.

The true rule to be applied to test the validity of state action in such a case is the rule to be found in the terms of the trust upon which the street is held. Whatever is consistent with the terms of that trust, i. e., consistent with street uses, the state may authorize, however injurious it may be to abutting owners. Whatever is inconsistent with those street uses, as this elevated structure is inconsistent, the state is precluded from authorizing, except upon making compensation for the property taken.

Respectfully submitted,

ELIHU ROOT,
J. C. BUSHBY,
L. M. BERKELEY,
Of Counsel for Plaintiff in Error.